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March 14, 2011

VIA EMAIL AND FIRST-CLASS MAIL

Ken Salazar, Secretary
Department of the Interior
1849 C Street NW, MS 4141—MIB
Washington, D.C. 20240

Through:

Ms. Mary Milam
U.S. Department of the Interior
Tribal Consultation Policy
consultation@doi.gov
1849 C Street NW, MS 4141—MIB
Washington, D.C. 20240

Re: Comments on Draft DOI Tribal Consultation Policy

Dear Ms. Milam:

On behalf of the Pueblo of Laguna, this letter provides comments on the January 14, 2011 Draft Department of Interior ("DOI") Tribal Consultation Policy ("Proposed Policy"), in response to January 14, 2011 DOI News Release.

As explained below, the Proposed Policy should be revised as follows: (1) Section I should be revised to clearly state that consultation with Indian tribes is a legal requirement for policies that have tribal implications; (2) Section II should be revised to recognize the fundamental principles of the fiduciary relationship, inherent tribal sovereignty, and self-determination that guide consultation with Indian tribes, as well as additional governing policymaking criteria; (3) Section III.D should be revised to clarify "substantial direct effect" and what administrative orders are exempt, and to correct typographic errors; (4) Sections V and VIII should be revised to clarify the requirements for meaningful consultation; (5) Section VIII should be revised to include and explain an identification stage to the consultation process and to require written notice of the analysis and conclusion of each stage of the consultation process; and (6) Section VIII.A should be revised to clarify that consultation will take place well in advance of proposed Departmental action.

1. Proposed Policy Section I should be revised to clearly state that consultation with Indian tribes is a legal requirement for policies that have tribal implications.

Section I of the Proposed Policy states generally that DOI has an obligation to consult with Indian tribes. This Section should be revised to clarify that consulting with Indian tribes is a legal requirement for policies with tribal implications. The Proposed Policy is being issued pursuant to the 2009 Presidential Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 9, 2009), and Executive Order 13175, on Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000). Executive Order 13175 applies to specifically defined “[p]olicies that have tribal implications[.]” *Id.* at 67249 (Section 1(a)). It also expressly provides that “[e]ach agency *shall* have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” *Id.* at 67250 (Section 5(a); emphasis added). Moreover, for any draft final regulation that has tribal implications, “each agency shall include a certification from the official designated to ensure compliance with this order stating that the *requirements* of this order have been met in a meaningful and timely manner.” *Id.* at 67251 (section 7(a), emphasis added); *see also id.* (similar requirement for proposed legislation in Section 7(b)). Indeed, failure to comply with a consultation policy violates the distinctive trust obligation that applies to federal dealings with Indians. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979). The Proposed Policy therefore should be revised to clarify its scope and mandate.

2. Proposed Policy Section II should be revised to recognize the fundamental principles of the fiduciary relationship, inherent tribal sovereignty, and self-determination that guide consultation with Indian tribes, as well as additional governing policies.

Section II of the Proposed Policy expressly provides “Guiding Principles” for DOI’s consultation with Indian tribes. However, the principles stated there notably omit the three “fundamental principles” that are stated in Executive Order 13175—which the Proposed Policy is intended to implement—which “shall” guide agencies in “formulating or implementing policies that have tribal implications[.]” *Id.* at 67249 (Section 2). In particular, all such consultation must be guided by the “trust relationship with Indian tribes[.]” Indian tribes’ “inherent sovereign powers over their members and territory[.]” and “the right of Indian tribes to self-government . . . and self-determination.” *Id.* (Sections 2(a)-(c)). All three of these fundamental principles must be expressly recognized in the Proposed Policy. Also, the Proposed Policy must clearly recognize that the fiduciary duty owed to Indian tribes means compliance with statutes and regulations “at a minimum[.]” *Quechan Tribe of Fort Yuma Indian Reservation v. United States Dep’t of Interior*, ___ F. Supp. 2d ___, ___, No. 10-2241, 2010 WL 5113197, *4 (S.D. Cal. Dec. 15, 2010) (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006)). Also, where tribal trust assets are involved, the United States’ fiduciary duties are not limited to the express terms of statutes and regulations, but also include common-law fiduciary duties. *See generally United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476-77 (2003); *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004); *Cobell v. Norton*, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001); 303 DM 2.7 (providing “Department-wide guidance for carrying out the Secretary’s trust responsibility as it pertains to Indian trust assets”).

The Proposed Policy also should recognize and incorporate additional governing policymaking criteria outlined in Sections 3(a)-(c) of Executive Order 13175 and Articles 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which has been publically endorsed by President Obama and formally supported by the U.S. Department of State. The Executive Order requires that agencies encourage Indian tribes to develop their own policies to achieve program objectives, defer to Indian tribes to establish standards where possible, and consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes. 65 Fed. Reg. at 67249-50. The UN Declaration recognizes—not as a mere aspiration, but as a matter of established human rights norms reflected in current international law—that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, and that states shall consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior, and informed consent before states adopt and implement administrative measures that may affect them. G.A. Res. 61/68, U.N. Doc. A/61/L.67, at arts. 18-19 (June 7, 2007).

3. Proposed Policy Section III.D should be revised to clarify “substantial direct effect” and what administrative orders are exempt, and to correct typographic errors.

Section III.D of the Proposed Policy defines “Departmental Action with Tribal Implications” to which the Proposed Policy applies, in part by reference to activities that “may have a substantial direct effect on [a] Tribe or Tribal members[.]” In addition, the definition exempts from the Proposed Policy “matters that [are] undertaken in accordance with an administrative or judicial order.” While the reference to “substantial” is likely taken from the definition of “policies that have tribal implications” in Section 1(a) of Executive Order 13175, 65 Fed. Reg. at 67249, the term “substantial” is nonetheless overly vague. For comparison, “significant” has been defined at length for use under the National Environmental Policy Act, including separately regarding context and intensity. *See* 40 C.F.R. § 1508.27. In addition, the term “administrative order” should be defined narrowly, so that it is not misunderstood to mean that anything that an agency unilaterally or informally so orders is exempt from the consultation mandate of Executive Order 13175. Finally, as noted in the Proposed Policy clauses quoted above, “a” should be inserted before “Tribe” and before the word “undertaken” either “are” should be inserted or “that” should be deleted.

4. Proposed Policy Sections V and VIII should be revised to clarify the requirements for meaningful consultation.

Section V of the Proposed Policy states that “[e]ach Office or Bureau is responsible for meaningful communication with Indian Tribes that promotes regular and early consultation” Proposed Policy § V. In turn, Section VIII provides consultation guidelines. Both of these sections should be revised to clarify that “[m]eaningful communication means tribal consultation well in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker.” *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995). Also, the sections should provide that public informational meetings and mere invitations to consult do not amount to meaningful government-to-government consultation. *Quechan Tribe*,

2010 WL 5113197, at *13. Both sections of the Proposed Policy also should recognize that meaningful consultation is not determined by mere *pro forma* recitals, or the sheer volume or size of documents or the number of letters, reports, or meetings. *See id.* at *13.

5. Proposed Policy Section VIII should be revised to include and explain an identification stage to the consultation process and to require written notice of the analysis and conclusion of each stage of the consultation process.

Section VIII of the Proposed Policy should be revised to include an identification stage, at which DOI will identify activities that are appropriate for consultation. For example, under the U.S. Environmental Protection Agency's proposed tribal consultation policy, the consultation process begins with an identification phase. *See, e.g.,* EPA, Proposed Final Policy on Consultation and Coordination with Indian Tribes, 75 Fed. Reg. 78198, 78200 (Dec. 5, 2010) (Section V.A.1). Without an identification phase it is unclear what processes DOI will use to properly identify which actions that affect tribal interests require consultation. The Proposed Policy should also explain with specificity the mechanisms for identifying matters for consultation with Indian tribes. *See id.* at 78201 (Sections V.B.2.a-d). Without such specificity it is unclear how DOI will make its determinations about whether to consult. In addition, the Proposed Policy should be revised to require DOI to send potentially affected tribes written notice of DOI's analysis and conclusion of each of the consultation stages.

6. Proposed Policy Section VIII.A should be revised to clarify that consultation will take place well in advance of proposed Departmental action.

Section VIII.A of the Proposed Policy states that DOI must provide up to 30 days' advance notice of consultation, but does not specify when consultation will take place in relation to proposed Departmental action. This Section should be revised to clarify that consultation will take place well in advance of Departmental action, to ensure that DOI "shall have an accountable process to ensure meaningful and timely input by tribal officials" as required by Executive Order 13175. *See* 65 Fed. Reg. at 67250 (Section 5(a)). Specifying a minimum advance time for consultation before Departmental action will allow Indian tribes adequate time to prepare, investigate, and respond to DOI's consultation request. Failing to initiate consultation sufficiently in advance of Departmental action will not allow for required meaningful and timely consultation. *See Quechan Tribe*, 2010 WL 5113197, at *13 (criticizing BLM for not meeting with tribe until "well after the project was approved"); *Lower Brule Sioux Tribe*, 911 F. Supp. at 401 ("meaningful consultation means tribal consultation in advance"); 75 Fed. Reg. at 78201 (EPA Policy Section V.C that "Consultation should occur early enough to allow tribes the opportunity to provide meaningful input").

I hope that you will find these comments helpful. Please contact my office if you have any questions.

Sincerely,

PUEBLO OF LAGUNA

A handwritten signature in black ink, appearing to read 'Richard Luarkie', written in a cursive style.

Richard Luarkie
Governor